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**91-315**

No.

Supreme Court, U.S.  
**FILED**

**AUG 14 1991**

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

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October Term, 1991

DONATO D'ONOFRIO,

*Petitioner,*

vs.

W. CARY EDWARDS, Attorney General of New Jersey, JOHN F. VASSALLO, JR., Director Division of Alcoholic Beverage Control, and NEW JERSEY LICENSED BEVERAGE ASSOCIATION,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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BARRY H. EVENCHICK

JOSEPH M. JACOBS

*Of Counsel and*

*On the Petition*



## **QUESTION PRESENTED**

Where a 1962 New Jersey statute limiting to two the number of alcoholic beverage retail licenses a person may hold, was immediately subjected to an exemption for certain hotels and later subjected to exemptions for restaurants, certain bowling establishments, international airports and casinos (and where a companion statute allows all holders of more than two licenses prior to 1962 to continue to hold and renew all their licenses) does not such statute deny equal protection of the law under the Fourteenth Amendment of the United States Constitution?

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No.

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In The

**Supreme Court of the United States**

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October Term, 1991

DONATO D'ONOFRIO,

*Petitioner,*

vs.

W. CARY EDWARDS, Attorney General of New Jersey, JOHN F. VASSALLO, JR., Director, Division of Alcoholic Beverage Control, and NEW JERSEY LICENSED BEVERAGE ASSOCIATION,

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR  
COURT OF NEW JERSEY, APPELLATE DIVISION**

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Petitioner, Donato D'Onofrio, prays that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in the above-entitled case on March

1, 1991 (Appendix B, 2a to 3a).\* The Supreme Court of New Jersey denied petitioner's request for certification and dismissed the appeal on May 14, 1991 (Appendix A, 1a).

### **OPINION BELOW**

The opinion of the Superior Court, Appellate Division, is not reported and is printed in full in the appendix to this petition (Appendix B, 2a to 3a).

### **STATEMENT OF JURISDICTION**

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on March 1, 1991. The aforementioned petition for certification and appeal were denied and dismissed respectively on May 14, 1991. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257.

### **CONSIDERATION GOVERNING REVIEW**

The New Jersey court of last resort has decided a federal question in a way that conflicts with a decision of the Nebraska court of last resort. Sup. Ct. Rule 10.1.(b).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fourteenth Amendment of the Constitution of the United States (Appendix E, 13a) and Title 33, New Jersey Statutes

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\* The complaint named only W. Cary Edwards, then the Attorney General of the State of New Jersey, and John F. Vassallo, Jr., then the Director of the Division of Alcoholic Beverage Control of New Jersey as defendants. Thereafter, the New Jersey Licensed Beverage Association was permitted to intervene as a defendant by the trial court.

Annotated, Sections 1-12.31 and 1-12.35 (Appendix F, 14a).

### STATEMENT OF THE CASE

Petitioner, Donato D'Onofrio, cannot acquire an additional alcoholic beverage retail license because of the limitations contained in N.J.S.A. 33:1-12.31. That limitation prevents him and others similarly situated from competing effectively in the industry and from bequeathing his present licenses to his children (since they too each already own two such licenses and cannot acquire more).

A challenge to the constitutionality of the foregoing statute alleging, *inter alia*, equal protection denials under both the federal and state Constitutions was brought in the form of a declaratory judgment action in the New Jersey Superior Court, Chancery Division. In essence, the argument presented was that, since the validity of the statute was originally upheld by the New Jersey Supreme Court in *Grand Union v. Sills*, 43 N.J. 390, 204 A.2d 853 (1964), circumstances had changed and exemptions had been added to the statute so that the result was a prohibition which no longer had any rational connection to a public purpose and which denied the equal protection of the law to petitioner.

The trial court granted respondents' motions for summary judgment. In so doing, it was held that the purposes and policies underlying *Grand Union* had not changed and that the statute was "constitutionally viable" (Appendix D, 12a).

An appeal was taken to the Superior Court of New Jersey, Appellate Division. That court noted that the constitutionality of N.J.S.A. 33:1-12.31 had been determined in *Grand Union* and further found that the restriction on ownership of more than two retail licenses was "... still reasonably supportable ... ." The Appellate Division also observed that any departure from *Grand Union* "... may be considered only by the Supreme Court."

(Appendix B, 4a). A combination petition for certification and notice of appeal was timely filed with the Supreme Court of New Jersey. The order of that court, denying the petition and dismissing the appeal, was filed on May 14, 1991 (Appendix A, 1a).

## REASONS FOR GRANTING THE WRIT

**EXEMPTIONS TO THE LEGISLATIVE CLASSIFICATIONS HERE AT ISSUE HAVE BEEN SEVERAL AND, THERE BEING NO RATIONAL PUBLIC PURPOSE SERVED BY SUCH EXEMPTIONS, HAVE WORKED TO DENY EQUAL PROTECTION OF THE LAW TO SOME MEMBERS OF THE SAME CLASS.**

The highest courts of two states, New Jersey and Nebraska, have come to opposite conclusions regarding the question of whether a statutory restriction on the right to acquire more than two alcoholic beverage retail licenses is an equal protection denial under the Fourteenth Amendment of the Constitution of the United States. The *Grand Union* case, *supra*, as relied upon in the decision of the New Jersey Superior Court, Appellate Division (and the Chancery Division) in the instant case answers the question in the negative. Diametrically opposed to that decision, however, is the Supreme Court of Nebraska in the case of *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W. 2d 85 (1985). Both states' courts considered statutes which are remarkably similar.

In the more than twenty-six years which have elapsed since the Supreme Court of New Jersey decided the *Grand Union* case, a number of statutory exemptions to the two-license prohibition were adopted. These include exemptions for restaurants, bowling establishments, international airports and casinos (the original legislation also contained an exemption for certain types of hotels). Additionally, "deregulation" of the alcoholic beverage industry

occurred at the end of the 1970s. The underlying policy rationale of the "deregulation rules," as they have come to be known, was retail price competition. This was a fundamental alteration of a four-decade policy of retail price maintenance in the alcoholic beverage industry.

As noted in this petition, the petitioner took the position, in the declaratory judgment action filed in the trial court, that the advent of deregulation with the emphasis on the promotion of competition, combined with the fact that exemption after exemption had been added to the general two-license prohibition, served to deny to him the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States as well as the Constitution of the State of New Jersey. Exacerbating the situation is the fact that the original legislation of 1962 also provided a grandfather provision which permitted the holder of any retail licenses previously acquired ". . . to continue to hold, use and renew such licenses." (N.J.S.A. 33:1-12.35, Appendix F, 14a).

In addition to advancing the argument in the courts below that he was impaired in his ability to compete effectively by virtue of this discriminatory statutory treatment, the petitioner also urged that he was being deprived, without justification, of the right to bequeath his retail businesses (which were the fruits of his life's labors) to his children, the reason being that they already owned two alcoholic beverage retail licenses and, therefore, could not acquire any additional licenses.

The issue as to the statutory exemptions which were added after the enactment of the two-license limitation statute could not, of course, have been presented to the Supreme Court of New Jersey in the *Grand Union* case, since that decision was just two years after the subject legislation. For that reason, petitioner anticipated that the equal protection argument made to the

Superior Court, Appellate Division, in the instant case was particularly viable in the constitutional sense, because of the fact that in the almost thirty years that have elapsed since the statute was promulgated, these exemptions have come about without any discernible rationale or nexus to any articulated public purpose. It is, of course, recognized that the Supreme Court of New Jersey, by denying the certification and dismissing the notice of appeal, declined to reconsider the equal protection argument in the light of the events which transpired after *Grand Union*. By its order however the Supreme Court of New Jersey has overlooked a substantial federal constitutional issue, discrimination, which, at this juncture, can only be remedied through the grant of the writ of certiorari in the present case and the opportunity of this Court to consider the question in the light of contemporary events.

In 1985, the Supreme Court of Nebraska considered a case which involved a remarkably similar statute and, in part, the identical federal constitutional issue, *to wit*, whether there had been an equal protection denial under the Fourteenth Amendment. The case was *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, *supra*. As described in the decision, the Nebraska statute (Neb. Rev. Stat. Sections 53-124.01, *et seq.*) prohibited a person from acquiring a beneficial interest in more than a total of two alcoholic beverage retail licenses. However, excepted from that prohibition were licenses issued to any city of the primary or metropolitan class to be used in city-owned facilities open to the public; licenses issued to a person for use in connection with the operation of a hotel containing at least twenty-five sleeping rooms; licenses for use in the operation of bowling establishments containing at least twelve bowling lanes; licenses restricted to on-premises sale of beer only in a restaurant, or licenses issued to a person for use in a restaurant having food sales of at least sixty percent of its total gross sales. The argument in that case was that the various legislative exemptions obtained by special interest groups created

a discriminatory classification which was both unjustified and arbitrary.

The Nebraska Supreme Court pointed out that "a legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are allowed where they are made applicable to all persons of the same class similarly situated." 220 Neb. 242, 243, 369 N.W. 2d 85, 87 (1985).

The decision in *Casey's* also pointed out that, in its original form, the Nebraska two-license prohibition (adopted in 1963), contained only one exemption, *to wit*, for hotels having more than twenty-five sleeping rooms (a substantially similar exemption was contained in the original New Jersey legislation). A Nebraska Supreme Court decision in 1966, *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 had upheld the statute in question, finding essentially that there was a substantial difference between hotels and supermarkets, the former being a traditional place for the travelling public to seek lodging and food and drink and refreshment and the latter providing an opportunity for the operator, with the ability to purchase in quantity and undersell the individual small liquor operator, to produce conditions which would stifle competition. However, as was true in the intervening years in New Jersey, the Nebraska legislature had adopted the exemptions (noted *supra*) in the years which followed.

The Nebraska Supreme Court distinguished *Safeway Stores, supra*, as well as the New Jersey decision, *Grand Union v. Sills, supra*, as involving classifications which then were neither irrational nor invidiously discriminatory. Thus, at the time of those decisions, no equal protection violation was found. However, in *Casey's*, the Nebraska Supreme Court held:

Since the holding in *Safeway Stores*, there

have been several additional exemptions added to Section 53-124.03: for restaurants serving beer only (1973), cities of the primary or metropolitan class (1975), bowling alleys of at least 12 lanes (1978), and restaurants having food sales of at least sixty percent of their gross sales (1979). In light of these further exemptions, and recent case law in related areas, the thinking in *Safeway Stores* is no longer persuasive.

A regulation valid when made may become arbitrary by reason of later events. *Abie State Bank v. Bryan*, 282 U.S. 765, 51 S. Ct. 252, 75 L. Ed. 690 (1931) [and citing other state decisions].

The present exemptions allow large chain hotels and restaurants to hold more than two liquor licenses, as well as cities and bowling alleys. These numerous exemptions render obsolete the original argument of limiting liquor licenses to protect local Nebraska operations. [Legislative hearing references omitted.]

\* \* \*

Finally, the original policy of favoring local businesses to avoid chain store monopoly of the liquor industry flies in the face of recent case law denouncing legislative attempts to destroy lawful competition. [State citations omitted.]

\* \* \*

It is the obligation of the judiciary to declare a statute invalid where it arbitrarily and

unreasonably violates the Constitution. [Citation omitted.]

Here, as the classifications . . . treat classes similarly situated differently without substantial justification, the statutes violate equal protection under the fourteenth amendment of the U.S. Constitution and article one, section one of the Nebraska Constitution.

220 Neb. at pp. 245-46, 369 N.W. 2d at pp. 87-88.

It is urged that the exact reasoning of the Nebraska Supreme Court is applicable to the situation in New Jersey. To the extent that the *Grand Union* case is inconsistent with the recent holding of the Nebraska Supreme Court, it is readily apparent that the probable explanation for such inconsistency is that the *Grand Union* case, like the *Safeway Stores* decision in Nebraska, considered the two-license limitation provision in its original form. The *Casey's* case, however, considered the modern version of the two-license limitation, after it had been essentially fragmented by the various exemptions. The same kinds of exemptions in New Jersey provide no greater rationale than was the case in Nebraska for sustaining the validity of the statute.

The legislative classification can be said to comply with the requirements of the equal protection clause of the Fourteenth Amendment only if it "rationally furthers the purpose identified by the State." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). If the classification is unrelated or inimical to the legislative purpose, it will be set aside. *Ibid.*; *Johnson v. Robison*, 415 U.S. 361, 374-375 (1974).

The record in the instant case is devoid of any expression by the Legislature of New Jersey of why there are distinctions

between those who are chosen to be beneficiaries of exemptions and those, such as petitioner, who are not. The present case presents the opportunity for this Court to consider the question of whether, as contended by petitioner, the continued enforcement of a prohibition which serves to work only against a limited class of retailers in New Jersey is arbitrary and discriminatory.

It is submitted that the record contains nothing by way of legislative history of the Alcoholic Beverage Control Act of New Jersey or any amendments thereto, or any reported decisions of New Jersey to demonstrate or even to suggest that the distinctions that have been drawn in the statute serve any public purpose. It is patently clear that the continued enforcement of the prohibition works for the benefit of those who are free of the restraint by virtue of the grandfather clause or by virtue of being in an exempt class. Petitioner cannot compete with those not restricted. A law such as the two-license limitation, which on its face is prohibitory and discriminatory should be scrutinized to determine if there is a reasonable relationship between it and some legitimate public purpose. It is submitted that such scrutiny would compel the conclusion that a rational relationship at this point in the history of the act in New Jersey is totally lacking.

Petitioner thus is being denied the right to compete freely and to convey his businesses by testamentary disposition. Despite the exemptions and despite the changes in circumstances (the advent of deregulation in New Jersey) petitioner continues to be restrained and disabled from carrying on his business in the way that he chooses. There is simply no relationship to any current public purpose, and there is certainly no justification for carving out exemption after exemption, but leaving the petitioner in the same position that he has been in since 1962 when the statute was promulgated.

The maxim which holds that when the reason for the law

ceases to exist, the law should cease to exist is particularly fitting in this case. The Nebraska Supreme Court clearly has seen the wisdom of the equal protection argument being made by petitioner here. Unfortunately, the New Jersey Supreme Court has not seen fit, as its sister court in Nebraska has, to review the statute in the light of exemptions which have occurred in the almost thirty years since the statute was passed. By the New Jersey Supreme Court declining to grant review, the effect has been to leave in effect decisions by the two highest courts of two states which are in direct contradiction to each other on the equal protection argument.

### CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

BARRY H. EVENCHICK  
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Livingston, New Jersey 07039  
(201) 994-0200

BARRY H. EVENCHICK  
JOSEPH M. JACOBS  
*Of Counsel and*  
*On the Petition*



**APPENDIX A — OPINION OF THE SUPREME COURT OF  
NEW JERSEY DENYING PETITION FOR CERTIFICATION  
AND DISMISSING APPEAL FILED MAY 16, 1991**

SUPREME COURT OF NEW JERSEY  
C-852 September Term 1990

33,384

DONATO D'ONOFRIO,

Plaintiff-Petitioner,

vs.

W. CARY EDWARDS, etc., et al,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-3565-89T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the notice of appeal is dismissed pursuant to *Rule 2:12-9*.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 14th day of May, 1991.

*Appendix A*

s/ Stephen W. Townsend  
CLERK OF THE  
SUPREME COURT

(stamped)

I hereby certify that the foregoing  
is a true copy of the original on file  
in my office.

s/ Stephen W. Townsend  
CLERK OF THE SUPREME COURT  
OF NEW JERSEY

**APPENDIX B — PER CURIAM OPINION OF THE  
SUPERIOR COURT OF NEW JERSEY FILED MARCH 1, 1991**

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A-3565-89T1

DONATO D'ONOFRIO,

Plaintiff-Appellant,

v.

W. CARY EDWARDS, ATTORNEY GENERAL OF NEW  
JERSEY; JOHN F. VASSALLO, JR., DIRECTOR, DIVISION  
OF ALCOHOLIC BEVERAGE CONTROL and NEW JERSEY  
LICENSED BEVERAGE ASSOCIATION,

Defendants-Respondents.

Argued February 13, 1991 - Decided March 1, 1991

Before Judges Antell and Keefe.

On appeal from Superior Court, Chancery Division,  
Mercer County.

Barry H. Evenchick argued the cause for appellant.

Lee Barry, Deputy Attorney General, argued the cause  
for respondent State (Robert J. Del Tufo, Attorney  
General of New Jersey, attorney; Michael R. Clancy,

*Appendix B*

Assistant Attorney General, of counsel; Lee Barry, Deputy Attorney General, on the brief).

John R. Poeta argued the cause for respondent New Jersey Licensed Beverage Association (Robert Wilinski, attorney; Richard S. Mroz, on the brief).

PER CURIAM

Plaintiff attacks the constitutional validity of *N.J.S.A.* 33:1-12.31, a provision of the Alcoholic Beverage Control Law which prohibits anyone from holding more than two retail liquor licenses. The constitutionality of that statute was determined in *Grand Union Co. v. Sills*, 43 *N.J.* 390 (1964), but plaintiff argued that the considerations of public policy upon which that decision rested no longer prevail. *Grand Union* found that the provision served the legislative policies of promoting temperance and trade stability, but plaintiff argues that these have been changed. He maintains that, rather than temperance, the legislative goal is now moderation, that the concept of trade stability has now been drawn into question by the fact of price deregulation, and that the law has been so altered by the enactment of exceptions since *Grand Union* that it no longer bears any reasonable relationship to any proper current policy objective.

In our view, the legislative finding that the restriction on owning more than two retail licenses encourages competition and maintains trade stability is still reasonably supportable and the restriction constitutes a legitimate use of the police power. In view of *Grand Union Co. v. Sills*, *supra*, any departure from this proposition may be considered only by the Supreme Court. We affirm substantially for the reasons stated by Judge Levy in his formal written opinion of February 2, 1990, for the Chancery

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*Appendix B*

Division.

(stamped)

I hereby certify that the  
foregoing is a true copy of the  
original on file in my office.

s/ Emille R. Cox

Clerk

**APPENDIX C — ORDER FOR JUDGMENT OF THE  
SUPERIOR COURT OF NEW JERSEY, CHANCERY  
DIVISION FILED FEBRUARY 2, 1990**

**PETER N. PERRETTI, JR.**  
**ATTORNEY GENERAL OF NEW JERSEY**  
Attorney for State Defendants

By: Lee Barry, Deputy Attorney General  
Law Division CN 112 7th Floor West  
Richard J. Hughes Justice Complex  
Trenton, New Jersey 08625  
(609) 984-8150

**SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MERCER COUNTY  
DOCKET NO. C88-0168**

Civil Action

**DONATO D'ONOFRIO,**

Plaintiff,

v.

**W. CARY EDWARDS, ATTORNEY GENERAL OF NEW  
JERSEY: JOHN F. VASSALLO, JR., DIRECTOR, DIVISION  
OF ALCOHOLIC BEVERAGE CONTROL and NEW JERSEY  
LICENSED BEVERAGE ASSOCIATION,**

Defendants.

**ORDER**

*Appendix C*

This matter having been opened to the Court by Peter N. Perretti, Jr., Attorney General of New Jersey, attorney for the Division of Alcoholic Beverage Control (State Defendants), Lee Barry, Deputy Attorney General appearing, and the Court having considered the papers submitted in support herein; and for good cause shown;

IT IS on this 2nd day of February, 1990;

ORDERED, ADJUDGED AND DECREED, THAT:

1. The motion for summary judgment on behalf of the State Defendants is hereby GRANTED;

*N.J.S.A.* 33:1-12.31 does not deprive the Plaintiff of any rights under the New Jersey or United States Constitutions;

3. The Plaintiff's request for declaratory judgment in his favor is hereby DENIED, and, accordingly, the Complaint is hereby DISMISSED with prejudice.

A copy of this Order shall be served upon all parties within seven (7) days.

s/ Paul G. Levy  
PAUL G. LEVY  
J.S.C.

**APPENDIX D — OPINION OF HONORABLE PAUL G.  
LEVY, J.S.C. FILED FEBRUARY 2, 1990**

**NOT FOR PUBLICATION WITHOUT THE APPROVAL  
OF THE COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - MERCER COUNTY  
GENERAL EQUITY PART  
DOCKET NO. 88-C-00168**

**Civil Action**

**DONATO D'ONOFRIO**

**Plaintiff,**

**v.**

**W. CARY EDWARDS, et als.,**

**Defendants.**

**OPINION**

**Decided: February 2, 1990**

**Barry H. Evenchick, Esq., appeared for plaintiff  
(Evenchick & Breslin, Esqs., attorneys).**

**Lee Barry, Deputy Attorney General, appeared for State  
defendants (Robert J. DelTufo, Attorney General of New  
Jersey, attorney)**

**Richard S. Mroz, Esq., appeared for defendant New Jersey**

*Appendix D*

Licensed Beverage Association (Cahill, Wilinski  
& Cahill, Esqs., attorneys).

LEVY, P.J.Ch.

*N.J.S.A.* 33:1-12.31, prohibiting an individual or entity from acquiring a beneficial interest in more than two alcoholic beverage retail licenses, was enacted in 1962. Shortly thereafter, it survived a constitutional challenge when the Supreme Court held that the purposes of the statute were reasonably related to public policies favoring trade stability and promotion of temperance. *See, Grand Union v. Sills*, 43 *N.J.* 390 (1964). The court found that the Legislature could terminate or severely regulate all liquor sales without infringing the due process clause or violating the equal protection clause. Certain exceptions were made part of the original legislation, and others were added since then. In 1985, the most recent amendments were enacted, creating another exception but not eliminating the two license limitation. The Statement to the bill in the Senate says that the amendments then made were "in light of the social attitudes and economic conditions which exist in the 1980s," and section 4 of the Act (codified at *N.J.S.A.* 33:1-3.1(b)) sets forth the legislative findings of the public policy of the state and the legislative purpose of Title 33 (the entire New Jersey Alcoholic Beverage Control Act).

Plaintiff is the holder of three licenses,<sup>1</sup> and he challenges the continued vitality of the two license limit. He claims that without additional licenses, he cannot reasonably compete with others in the retail liquor business, and he cannot devise his licenses to his children because each of them already owns two licenses.

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1. He acquired these before 1962 and was "grandfathered" as an exception to the original legislation.

### Appendix D

He offers evidence that the current policy of price deregulation is meant "to promote retail price competition and that such was a fundamental alteration of a four-decade policy of retail price maintenance which existed in the alcoholic beverage industry," and that "the economic conditions and social attitudes which underlie the policy which lead to the deregulation rules represent a dramatic reversal of policy regulatory attitudes and assumptions." (Pb 6)<sup>2</sup>

In *Grand Union* the court based its ruling supporting the constitutionality of the legislation on its policies of promoting temperance and price stability. Plaintiff urges that the two-license limit has no current reasonable relationship to any current proper public objective since the 1985 amendments eliminated use of the word "temperance", and since deregulation promotes competition through lower prices, trade stability is no longer an important legislative concern. Thus, plaintiff claims, the basis for the *Grand Union* decision no longer exists and the two license limit is a nullity. Plaintiff also points to *Heir v. Degnan*, 82 N.J. 109 (1980) and to the repeal of N.J.S.A. 56:4-3 to 6 which had provided for fair trade contracts.

The State, joined by the New Jersey Licensed Beverage Association, defends by arguing that this court cannot overrule

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2. There is some question as to the admissibility of such evidence, which plaintiff proposes to introduce by expert testimony from the person serving as Attorney General of New Jersey when the deregulation policies were promulgated. This court has great respect for that Attorney General, but his letter report is basically a legal analysis of the plaintiff's claims, much like the brief submitted by plaintiff's counsel, rather than a factual analysis supporting a factual opinion. It appears, however, that defendants accept such opinion testimony as true, for purposes of the motion and cross-motion for summary judgment.

*Appendix D*

the Supreme Court and that one basis for *Grand Union*, maintenance of trade stability, is still a primary legislative concern, whether or not temperance is still a valid consideration.

*N.J.S.A.* 33:1-3.1(b) is a list of the 10 purposes and policies of alcoholic beverage regulation in this state. Among those listed are:

- (1) To strictly regulate alcoholic beverages to protect the health, safety and welfare of the people of this State.
- (2) To foster moderation and responsibility in the use and consumption of alcoholic beverages.
- (6) To provide a framework for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition.
- (7) To maintain trade stability.

It is obvious from this language that the express policy of this state is still to foster temperance and promote trade stability. Deregulation of prices requires even more strict regulation in the field to protect the public welfare. "Temperance" is defined as "moderation in action, thought or feeling," specifically "moderation in or abstinence from the use of intoxication drink." *Webster's New Collegiate Dictionary*, p. 1200 (1977). There is no other meaning to *N.J.S.A.* 33:1-3.1(b)(2) than promotion of temperance. The basic rulings of *Grand Union* are as valid today as they were 25 years ago. *Heir v. Degnan*, *supra* at 120, is not to the contrary; there the Supreme Court found that the

*Appendix D*

deregulation rules,<sup>3</sup> which replaced retail price maintenance with retail price competition, fostered the maintenance of price stability and promotion of temperance.

The Legislature is deemed to be aware of the rulings of the court, yet in 1985 it restated the same purposes and policies underlying *Grand Union* and did not repeal or amend N.J.S.A. 33:1-12.31. That statute is still constitutionally viable and *Grand Union* still applies until there is a legislative change to N.J.S.A. 33:1-12.31.

Defendant's motion for summary judgment is granted.

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3. Among other things, the ABC regulations eliminated retail price maintenance, except sales below cost, prohibited discrimination of sales and prohibited sales to credit delinquent retailers.

**APPENDIX E — FOURTEENTH AMENDMENT, SECTION  
ONE TO THE UNITED STATES CONSTITUTION**

Fourteenth Amendment, Section 1, to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**APPENDIX F — RELEVANT NEW JERSEY STATUTES**

Title 33, New Jersey Statutes Annotated, § 1-12.31

**Acquisition of beneficial interest in more  
than two retail licenses prohibited**

On and after the effective date of this act no person, as the same is defined in R.S. 33:1-1, shall, except as hereinafter provided, acquire a beneficial interest in more than a total of two alcoholic beverage retail licenses, but nothing herein shall require any such person who has, on August 3, 1962, such an interest in more than two such licenses to surrender, dispose of, or release his interest in any such license or licenses.

Title 33, New Jersey Statutes Annotated, § 1-12.35

**Right to continue to hold, use and renew  
existing licenses.**

Nothing in this act shall affect the right of any holder of retail licenses heretofore acquired to continue to hold, use and renew such licenses.



SEP 10 1991

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In The  
**Supreme Court of the United States**  
October Term, 1991

— ♦ —  
DONATO D'ONOFRIO,

*Petitioner,*

v.

W. CARY EDWARDS, ATTORNEY GENERAL OF  
NEW JERSEY, JOHN F. VASSALLO, JR., DIRECTOR,  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL,  
and NEW JERSEY LICENSED BEVERAGE  
ASSOCIATION,

*Respondents.*

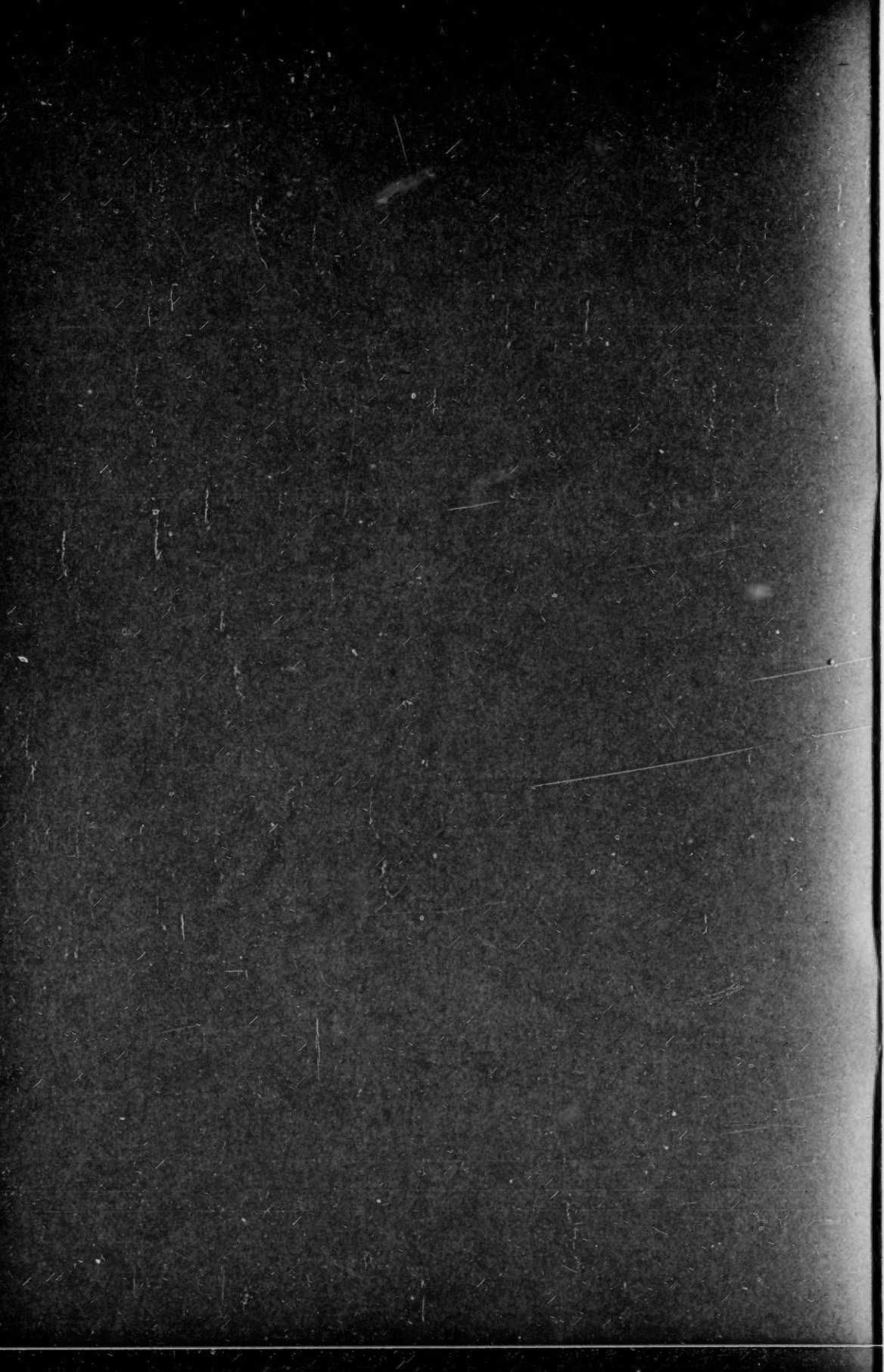
— ♦ —  
**Petition For Writ Of Certiorari To The  
Superior Court Of New Jersey, Appellate Division**  
— ♦ —

**BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI ON BEHALF OF RESPON-  
DENTS ATTORNEY GENERAL OF  
NEW JERSEY AND THE DIVISION OF  
ALCOHOLIC BEVERAGE CONTROL**  
— ♦ —

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## QUESTION PRESENTED

Does a 1962 New Jersey statute limiting to two the number of alcoholic beverage retail licenses a person may hold and which, through operation of a companion statute, contains exceptions for certain hotels, restaurants, certain bowling alleys and international airports, deny equal protection of the law under the Fourteenth Amendment of the United States Constitution?

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\* The list of parties is omitted because the names of all parties appear in the caption. *Sup.Ct.R.* 14.1(b).

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## STATEMENT OF THE CASE

*N.J.S.A. 33:1-12.31*, also known as the two-license limitation statute, provides that no person shall acquire a beneficial interest in more than a total of two alcoholic beverage retail licenses. That statute is part of a unified legislative policy limiting the number of retail liquor licenses in New Jersey. The number of retail liquor licenses that can be issued is also limited by population per municipality. *N.J.S.A. 33:1-12.14*, *33:1-12.15*. *N.J.S.A. 33:1-12.21* authorizes municipalities to promulgate regulations to further limit numbers of liquor licenses.

*N.J.S.A. 33:1-12.32* contains exceptions to the two-license limitation statute. The original exception applied to those holding liquor licenses in connection with the operation of certain hotels. That statute was amended in 1964 to permit a further exception for liquor licenses used in connection with restaurants. *N.J.S.A. 33:1-12.32* was further amended in 1983 to grant an exception for licenses used in connection with certain bowling alleys. In 1985, an additional exception was made for use of licenses within the grounds of international airports. Also, *N.J.S.A. 33:1-12.35*, the "grandfather" provision, preserved the interests in multiple licenses prior to August 3, 1962, the effective date of *N.J.S.A. 33:1-12.31*.

The Supreme Court of New Jersey unanimously upheld the constitutionality of *N.J.S.A. 33:1-12.31* in *Grand Union v. Sills*, 43 N.J. 390, 204 A.2d 853 (1964). In affirming the constitutionality of that statute, the Court found its public purpose was reasonably related to the State's policies favoring trade stability and the promotion

of temperance, *id.* at 404, 204 A.2d at 859, and did not violate principles of equal protection or due process. *Id.* at 404-05, 204 A.2d at 860-61.

In 1979 the New Jersey State Division of Alcoholic Beverage Control adopted new regulations eliminating retail price maintenance ("deregulation rules"). Those regulations eliminated retail price fixing except for a prohibition against sales below cost. *N.J. Admin. Code* § 13:2-24.8 (1980). The deregulation rules were challenged in *Heir v. Degnan*, 82 N.J. 109, 411 A.2d 194 (1980). In affirming those regulations, the New Jersey Supreme Court determined that the deregulation rules did not impair the "longstanding public policy of maintaining stability in the liquor industry and promoting temperance." *Id.* at 120, 411 A.2d at 199.

Donato D'Onofrio is the holder of more than two liquor licenses and alleges that the application of N.J.S.A. 33:1-12.31 thwarts his desire to acquire additional licenses and to later transfer his licenses to his children, each of whom presently holds interests in at least two licenses. He also claims that the two-license limitation prevents him from competing effectively in the liquor industry. However, it should be noted that D'Onofrio has not had an application for an additional license denied on the basis of that statute; nor does the record contain any evidence whatsoever to support the assertion that he has been denied the ability to compete in the retail liquor industry.

On September 21, 1988 D'Onofrio filed a complaint against the Attorney General of New Jersey and the Director of the New Jersey Division of Alcoholic Beverage Control ("State respondents") in the Chancery Division seeking a declaratory judgment that N.J.S.A. 33:1-12.31 is unconstitutional. Thereafter, the New Jersey

Licensed Beverage Association was granted the right to intervene as a party defendant.

On February 2, 1990 the chancery court granted the State respondents' motion for summary judgment and concluded that *N.J.S.A. 33:1-12.31* did not deprive D'Onofrio of any rights under the New Jersey or United States Constitutions. Although D'Onofrio argued that the economic conditions and social attitudes underlying deregulation represent a dramatic reversal of regulatory attitude which, when coupled with subsequent exceptions to the two-license limitation set forth in *N.J.S.A. 33:1-12.32*, cause the continued enforcement of *N.J.S.A. 33:1-12.31* to be arbitrary and unreasonable, the trial court rejected this argument and stated that the express policy of New Jersey is still to foster temperance and promote trade stability (Pa 11). The Appellate Division affirmed substantially for the reasons stated by the chancery judge and held that the legislative policies underlying the statute continue to be supportable and that the statute constitutes a legitimate exercise of the police power (Pa 4).

D'Onofrio petitioned the State's highest court for review of the intermediate appellate court's decision, and, in an order filed May 16, 1991, the New Jersey Supreme Court denied the application without comment (Pa 1-2). D'Onofrio filed a petition for *certiorari* with this Court on August 14, 1991 which was received by the State respondents on August 15, 1991.

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## SUMMARY OF REASONS FOR DENYING THE PETITION

1. N.J.S.A. 33:1-12.31 constitutes a legitimate exercise of New Jersey's police power under the Twenty-First Amendment, pursuant to which states have absolute power to ban the sale of alcoholic beverages within their boundaries and have authority to regulate the circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 599, 69 L.Ed.2d 357 (1981).

2. The petition should be denied because the courts below merely applied the long-settled principle that the State's authority to regulate the liquor industry constitutes a proper exercise of the police power. *California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342, 349-50 (1972); *Grand Union v. Sills*, *supra*, 43 N.J. at 403, 204 A.2d at 860.

3. It is well established that states are free to adopt differing means of regulation, especially when those regulations concern policies reserved to states under the police power, and accordingly, the Nebraska state court decision invalidating its two-license limitation statute in *Casey's Gen. Stores v. Nebraska Liquor Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985) is of no import. *California v. LaRue*, *supra*, 409 U.S. at 116, 93 S.Ct. at 396, 34 L.Ed.2d at 350; *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955); *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983), *cert. denied*, 469 U.S. 831, 105 S.Ct. 117, 83 L.Ed.2d 60 (1984).

4. The opinions below correctly concluded that, notwithstanding the State's deregulation of liquor prices and additional exceptions to the statute, the restriction on

owning more than two retail licenses continues to further the legislative objectives of promoting temperance and maintaining trade stability. As the New Jersey Legislature's justification for the statute is "at least debatable," a federal court should not find a denial of equal protection. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469, 101 S.Ct. 715, 725, 66 L.Ed.2d 659, 672 (1981); *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234, 1243 (1938).

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#### REASONS FOR DENYING THE PETITION

At issue is whether N.J.S.A. 33:1-12.31, which prohibits anyone in New Jersey from holding more than two retail liquor licenses, continues to be constitutional in light of changes in liquor laws and regulations, including additional exceptions to the two-license limitation expressed in N.J.S.A. 33:1-12.32 and the State's deregulation of retail liquor prices in 1979. There are no special and important reasons why the Court should review this case. *Sup.Ct.R.* 10. The opinions below merely applied the well established principle that the State's authority to regulate the liquor industry constitutes a proper exercise of the police power. *California v. LaRue*, *supra*, 409 U.S. at 114, 93 S.Ct. at 395, 34 L.Ed.2d at 349-50; *Grand Union v. Sills*, *supra*, 43 N.J. at 403, 204 A.2d at 860. Just such a case, and nothing more, is before the Court on this petition.

The State of New Jersey has a legitimate interest in regulating the number of liquor licenses issued to persons, regardless of the effect of restricting the transferability of licenses to those at or beyond their statutory

quota. *Id.* at 404-05, 204 A.2d at 860-61. There is a strong presumption of constitutionality in the area of liquor industry regulation. *New York State Liquor Authority v. Bellanca*, *supra*; *California v. LaRue*, *supra*; *Cafe Gallery, Inc. v. State*, 189 N.J. Super. 468, 462 A.2d 227 (Law Div. 1983). Traditionally, states have a wide latitude of discretion in enacting legislation under their police power. *Williamson v. Lee Optical of Oklahoma*, *supra*, 348 U.S. at 489, 75 S.Ct. at 465, 99 L.Ed. at 573. Reasonable regulations necessary to accomplish legitimate goals will not be held unconstitutional even if they restrict profits, *Exxon Corp. v. Federal Energy Administration*, 417 F. Supp. 516 (D.N.J. 1975), or diminish the value of established property interests, *Troy v. Renna*, 727 F.2d 287, 301-02 (3d Cir. 1984); *In re Ashe*, 669 F.2d 105, 110 (3d Cir. 1982); *Rogin v. Bensalem Township*, 616 F.2d 680, 692 (3d Cir. 1980).

Furthermore, the selling of alcoholic beverages is not a constitutional right. *Crowley v. Christensen*, 137 U.S. 86, 91, 11 S.Ct. 13, 15, 34 L.Ed. 620, 624 (1890); *Sea Girt Restaurant v. Borough of Sea Girt*, 625 F. Supp. 1482, 1485 (D.N.J. 1986), *aff'd*, 802 F.2d 448 (1986); *Joseph H. Reinfeld, Inc. v. Schieffelin & Co.*, 94 N.J. 400, 412, 466 A.2d 563, 569 (1983). In fact, the Twenty-First Amendment confers upon states the absolute power to ban the sale of alcoholic beverages within their boundaries and the authority to regulate the circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, *supra*. Therefore, absent a demonstration that N.J.S.A. 33:1-12.31 is unreasonable, it must be presumed rationally related to the regulation of the sale of liquor. *Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981); *U.S.A. Chamber of Commerce v. State*, 89 N.J. 131, 157-58 (1982).

The question of whether the application of *N.J.S.A.* 33:1-12.31 impermissibly thwarts D'Onofrio's desire to acquire additional package liquor stores was adequately considered by the courts below. Their reasons for upholding that statute were based on a sufficient record and persuasive precedent, including the prior determination by the New Jersey Supreme Court in *Grand Union v. Sills* that *N.J.S.A.* 33:1-12.31 does not deny equal protection. In *Grand Union*, certain retail liquor licensees alleged that the statute had no observable public purpose, was enacted only for the enhancement of private competitive interests and was, therefore, arbitrary and discriminatory. 43 *N.J.* at 395, 204 *A.2d* at 855. In reaching the conclusion that the statute did not deny equal protection, the State Supreme Court found that

Chapter 152 [*N.J.S.A.* 33:1-12.31] applies equally and indiscriminately by its terms to all retail licensees similarly situated, and to the extent that it is aimed at chain liquor store operations it cannot judicially be said to be either irrational or invidious. Indeed, the rationality and validity of various legislative enactments differentiating chain store operations from individual store operations have been recognized even in cases dealing with commodities which are essential in nature and are subject to much lesser regulation than liquor. [43 *N.J.* at 405, 204 *A.2d* at 861, citations omitted.]

Accordingly, the *Grand Union* Court upheld the validity of *N.J.S.A.* 33:1-12.31 on the basis that the legislature recognized that without such a limitation

absentee ownership or domination of retail establishments by distillers or other economically powerful interests, or the concentration of

retailing in the hands of an economically powerful few, would intensify the dangers of sales stimulations and other abuses and would be inimical to temperance and trade stability. . . . As was acknowledged by the appellants' experts, chain liquor stores would economically be the most capable of . . . growth through displacement of individual retail operators. Admittedly their mode of operations furthers absentee ownership in this highly susceptible branch of trade. [43 N.J. at 402-03, 204 A.2d at 859.]

The New Jersey Supreme Court therefore concluded that "while some may consider other regulatory courses to be preferable" there was sufficient evidence to support the conclusion that N.J.S.A. 33:1-12.31 was rationally related to legitimate legislative policies. *Id.* at 404-05, 204 A.2d at 860.

In this case, the courts below agreed that *Grand Union* continues to control and the restriction on owning more than two retail licenses constitutes a proper use of the police power. In addition, it is clear that the operation of the two-license limitation statute and the exceptions contained in N.J.S.A. 33:1-12.32 have uniform application to all licensees. Further, the courts rejected D'Onofrio's claim that the deregulation rules somehow altered the liquor laws to the extent that the two-license limitation statute no longer bears a reasonable relationship to any proper current policy objective. On the contrary, the chancery judge found that

Deregulation of prices requires even more strict regulation of the field to protect the public welfare. [Pa 11.]

Likewise, the Appellate Division concluded that

In our view, the legislative finding that the restriction on owning more than two retail licenses encourages competition and maintains trade stability is still reasonably supportable and the restriction constitutes a legitimate use of the police power. [Pa 4.]

In fact, in *Heir v. Degnan, supra*, which rejected a challenge to the deregulation rules, the New Jersey Supreme Court explicitly endorsed its previous decision upholding the constitutionality of the two-license limitation statute contained in *Grand Union*. 82 N.J. at 120, 411 A.2d at 199.

Clearly, the courts below properly determined that the New Jersey Supreme Court decisions upholding the constitutionality of N.J.S.A. 33:1-12.31 and the legislative policies supporting that statute continue to apply. D'Onofrio, as the holder of more than two licenses by virtue of the "grandfather" clause contained in N.J.S.A. 33:1-12.35, has no cause to complain that he has been economically disadvantaged; nor does the record in this matter contain any evidence whatsoever to support the assertion that he has been "denied the right to compete freely" in the retail liquor industry.

D'Onofrio's argument that a Nebraska decision invalidating its two-license limitation should apply here is also without merit. In *Casey's Gen. Stores v. Nebraska Liquor Cont. Comm., supra*, the state supreme court found Nebraska's statute to deny equal protection because it no longer furthered legislative policies. That determination was based in part on later findings by the Nebraska Legislature that liquor consumption was inelastic, and accordingly, the court found that the statute no longer

promoted temperance. 369 N.W.2d at 88. However, the New Jersey Supreme Court said otherwise, *i.e.*, that liquor consumption is elastic. *Grand Union v. Sills, supra*, 43 N.J. at 402, 204 A.2d at 859. Thus, there is no conflict with the Nebraska decision. Moreover, it has long been established that states are free to adopt differing means of regulation, especially when those regulations concern policies reserved to states under the police power. *California v. LaRue, supra*, 409 U.S. at 116, 93 S.Ct. at 396, 34 L.Ed.2d at 350; *Williamson v. Lee Optical of Oklahoma, supra*, 348 U.S. at 489, 75 S.Ct. at 465, 99 L.Ed. at 573; *Libertarian Party of Fla. v. Florida, supra*, 710 F.2d at 793.

Pursuant to their police power, other states have also fashioned methods of limiting package goods licenses that have withstood challenges on equal protection grounds. *See e.g., Johnston v. Matignetti*, 374 Mass. 784, 375 N.E.2d 290 (Mass. 1978) (three-license limitation that applied to package goods store owners but not to restaurateurs furthered policies of temperance and trade stability and did not violate equal protection); *Fargo Beverage Co. v. City of Fargo*, 459 N.W.2d 770 (N.D. 1990) (municipality's numerical limitation on licenses which prevented transfer of license to package goods store but which exempted hotels did not deny equal protection). *See also Brown v. City of Lake Geneva*, 919 F.2d 1299 (7th Cir. 1990) (denial of liquor license to bed and breakfast owner having a limited museum under statute permitting a city to supplement its allotment of licenses with respect to museum-restaurants did not deny equal protection). These cases illustrate the principle that states are afforded wide discretion in fashioning laws governing the limitation of liquor licenses. Accordingly, New Jersey is entitled

to enact laws under its police power to control the licensing of liquor establishments in furtherance of its own legislative policies and the Nebraska state court decision in *Casey's* is therefore of no import.

As long as there is a rational relation between a state's purpose and a statute, federal courts have no authority to pass on the judgment of the wisdom of legislative policy determinations. *Martinez v. California*, 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 487-88 (1986); *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030, 10 L.Ed.2d 93, 96 (1963). Federal courts are especially deferential when a challenge to an economic regulation is based solely on equal protection grounds. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511, 516-17 (1976). In this case, further review of the validity of N.J.S.A. 33:1-12.31 should be denied because the New Jersey Legislature rationally concluded that the statute furthered the policies of temperance and trade stability. Unlike the Nebraska Legislature, the New Jersey Legislature determined that consumption of liquor is elastic and that the restriction on licenses to sell package goods promotes temperance. *Grand Union v. Silis*, *supra*, 43 N.J. at 402, 204 A.2d at 859. As the New Jersey Legislature's justification for the statute is "at least debatable," a court should not find a denial of equal protection. *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at 469, 101 S.Ct. at 725, 66 L.Ed.2d at 672, quoting *United States v. Carolene Products Co.*, *supra*, 304 U.S. at 154, 58 S.Ct. at 784, 82 L.Ed. at 1243.

In conclusion, careful review and analysis of New Jersey Supreme Court precedent reveals that the

two-license limitation statute furthers legitimate State legislative policies and does not deny equal protection. The State court opinion at issue applied this well established precedent to determine that D'Onofrio was not denied equal protection. This conclusion presents no special and important reasons requiring further review by this Court and D'Onofrio's petition for a writ of *certiorari* should therefore be denied.

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CONCLUSION

For the foregoing reasons the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: September 13, 1991

